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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )  
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Rate Regulation )  
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)

MM Docket 92-266

To: The Commission

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, ValueVision International, Inc. ("ValueVision") submits the following opposition to three aspects of the petitions for reconsideration filed by Continental Cablevision, Inc. ("Continental"), Center for Media Education ("CME"), Booth American Company, et al. ("Booth") and Sur Corporation ("Sur") with respect to the leased commercial access provisions of the Report and Order issued in the above-referenced docket. FCC 93-177 (released May 3, 1993) ("Report").

I. CABLE OPERATORS PROVIDE NO SUPPORT FOR THEIR SUGGESTION THAT THE COMMISSION IGNORE MARKET RATES IN ESTABLISHING LEASED ACCESS RATES FOR COMPETING HOME SHOPPING PROGRAMMING

Some cable operators assert that the Commission should "clarify" that the maximum reasonable rate for lessees in the home shopping category is the implicit fee deemed to be charged under the Commission's formula plus the explicit fee charged by

the cable operator to unaffiliated home shopping programmers (i.e., typically 5% of net sales). Continental Petition at 24; see also Booth Petition at 46-47. These cable operators advance no justification for such a position. As noted in ValueVision's petition, adding implicit fees to the existing explicit fee framework already in place for home shopping networks makes no sense. It would also prevent competitive programmers like ValueVision from obtaining leased access as intended by the new rate regulation regime,<sup>1/</sup> would be unnecessary to prevent migration or financial loss to cable operators, and would ignore the existing market rate for home shopping programs. Time Warner, the second largest MSO in the country, agrees:

[T]he Commission should make clear that where  
~~an explicit fee on leased programming~~

rates in addition to an explicit fee of 5% of sales. ValueVision Petition at 10. Other petitioners agree that such rates undermine Congress' leased access objectives.<sup>3/</sup> Moreover, reliance on the market rate for leased access purposes will encourage diversity and competition in the delivery of home shopping programming, without encouraging migration or undermining the financial condition of cable operators. At market rates, existing home shopping programmers will not be able to reduce their costs by migrating to leased access. And cable operators will not suffer a loss because they will receive a fee for leased access that is no lower than the rate they are already charging to carry home shopping programming.<sup>4/</sup>

Although CME believes the implicit fee model would result in excessive leased access rates, it requests the Commission -- if it retains the implicit fee model -- to clarify that "home shopping leasing rates will consist of the 'all other'

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<sup>3/</sup> See petitions of CME, Community Broadcasters Association ("CBA"), Paradise Television Network, Inc., and Sur. As CBA notes in its petition for reconsideration, "the test of a rate policy here should be whether it facilitates the Congressional goal. To the extent there may be some doubt at this stage, such doubt should be resolved in favor of a policy that encourages such access." CBA Petition at 3.

<sup>4/</sup> As Sur points out, the "opportunity 'loss'" resulting from a cable operator's inability to market leased access channel capacity should not be considered as a ground for asserting an adverse financial effect on a cable system. Sur Petition at 16-17. That "loss" is simply the loss of an opportunity to charge higher than present monopsony rates. Protecting that opportunity is flatly inconsistent with the underlying principle of the leased access set-aside, and of the Cable Act's decision to regulate leased access rates in order to make that set-aside a reality.

rate plus the highest explicit fee paid by a home shopping channel on a given system." CME Petition at 8. CME argues that if the maximum leased access rate for home shopping lessees is limited to the explicit fee currently charged to QVC and HSN, most or all leased channels will be occupied by home shopping programmers. Id.

ValueVision opposes CME's request. As noted above, ValueVision agrees with CME that the implicit fee model would establish rates for programmers in the "all others" category that would prevent leased access from being the "genuine outlet" for their programming that Congress intended. S. Rep. No. 92, 102d Cong., 1st Sess. 79 (1991).<sup>5/</sup> The answer, however, is not to establish rates that would prevent new home shopping programmers from competing with QVC and HSN. Rather, the Commission should

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<sup>5/</sup> ValueVision also supports CME's suggestion that the Commission establish reasonable terms and conditions with respect to leased access channel placement, and that it revise its procedures for resolving leased access disputes. The viability of leased access could be substantially undermined if cable operators are given unfettered discretion to place leased access programming on any channel they choose. As Congress recognized, this is particularly true for programmers like ValueVision, which compete directly with cable channels in which the operator has an economic interest. See P.L. No. 102-385, Section 2(5). Lessees must also have access to the data on which the cable operators

focus on the problem of programmers in the "all others" category and solve it on its own terms, without establishing supracompetitive rates for new home shopping programmers, or forcing such programmers to subsidize others. Moreover, there is no reason to believe that most or all leased access channels will be occupied by home shopping programmers. ValueVision is presently the only home shopping service that competes with QVC and HSN. But if, consistent with its original 1972 leased access rules,<sup>6/</sup> the Commission requires cable operators to allocate leased access channel capacity on a non-discriminatory first-come, first-served basis, all programmers would have an equal opportunity to obtain leased access.

II. AS THE COMMISSION PROPERLY FOUND, HOME SHOPPING SHOULD BE RECOGNIZED AS A SEPARATE CATEGORY BECAUSE IT IS SOLD ON A DIFFERENT BASIS FROM OTHER CATEGORIES OF PROGRAMMING

Booth American Company, et. al. ("Booth") argue that establishing rates for leased access based on three categories of programming is arbitrary. Booth Petition at 46. These cable operators assert that there is no legitimate basis to differentiate home shopping programming from other types of programming, other than per channel or per event programs.

As ValueVision has noted, however, the economic terms on which home shopping programmers market their services are fundamentally different from those applicable to all other cable programming services. ValueVision Petition at 3. First, home

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<sup>6/</sup> See ValueVision Petition at 13.

shopping channels pay to obtain non-leased access carriage. More important, their earnings are based on net sales to viewers; other cable programmers' earnings are based on the sale of advertising and/or payments from cable operators based on the number of subscribers (or, in the case of pay channels, subscribers to the specific event or channel). Home shopping should not be lumped together with "all other" programming because the implicit fee model is both unnecessary and inappropriate in this context. See ValueVision Petition at 3.

III. THE COMMISSION SHOULD NOT ESTABLISH POTENTIALLY EXCLUSIVE PREFERENCES FOR MINORITY AND EDUCATIONAL PROGRAMMERS THAT CONGRESS DETERMINED NOT TO PROVIDE

In Section 9 of the Cable Act, Congress provided that cable operators may, if they choose, carry qualified minority and educational programming services, and thereby reduce by up to 33% the number of channels they are otherwise obliged to set aside for leased access. 47 U.S.C. § 532. This voluntary set-aside was intended to "provide cable operators increased incentives to carry minority programming services." H.R. Rep. No. 628, 102d Cong., 2d Sess. 122 (1992).

Although it recognizes that this provision is a voluntary one, Sur proposes that the Commission should require cable operators to provide "first use" to minority and educational programmers, "in determining to whom limited capacity may be leased." Sur Petition at 15. Sur therefore proposes that minority and educational programmers be given some form of mandatory preference that would potentially exclude all other

programmers from leased access. While the exact nature and operation of this proposed preference is unclear from Sur's petition, such a preference is contrary to the policy judgment that Congress reached.<sup>7/</sup>

Sur's proposal would also pose significant definitional problems, and place the Commission in the position of making difficult program content judgments. The Cable Act provides that a qualified minority programming source is a source that "devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned." 47 U.S.C. § 532(i)(2). Providing a mandatory and potentially exclusive preference for such minority programmers would thus require the Commission to arbitrate the questions of who are qualified minority programmers,<sup>8/</sup> what programming is relevant to

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See *Tennessee Valley Authority v. Hill*, 437 U.S. 153.

minorities,<sup>9/</sup> and which minority programmers "best" serve minority needs (if there are more eligible minority programmers than capacity available).<sup>10/</sup> Similar problems would arise in the context of educational programming. The Commission would have to determine what programming in fact "promotes public understanding of mathematics, the sciences, the humanities, and the arts." 47 U.S.C. § 532(i)(3).<sup>11/</sup> While these problems may pose some administrative difficulty in the context of voluntary preferences as established by Congress, they would lead to Commission intervention on an even greater scale if a potentially exclusive preference for minority and educational programmers were made mandatory despite congressional intent to the contrary.

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<sup>9/</sup> This issue is similar to the question of whether comparative broadcast applicants are entitled to preferences for program proposals that are unusually sensitive to minority needs. For examples of the difficulties in making such determinations, see Colonial Communications, Inc., 5 FCC Rcd 1967, 1970 n.5 (Rev. Bd. 1990), aff'd 6 FCC Rcd 2296, 2298 n.9 (1991); Chase Communications Co., 100 F.C.C.2d 689 (Rev. Bd. 1985); San Joaquin TV Improvement Corp., 96 F.C.C.2d 594, 600 (Rev. Bd. 1983), recon. denied, 96 F.C.C.2d 617 (Rev. Bd. 1984).

<sup>10/</sup> Sur suggests, for example, that where leased access capacity cannot be made available to all qualified minority lessees, "two minority programmers could be subject to tests as to which was to serve the larger minority population in the community, which such population was less well-served with video programming, which programmer was better situated by reason of experience and financial ability and which program service was best directed to otherwise unmet minority needs." Sur Petition at 15.

<sup>11/</sup> Cf. Policies and Rules Concerning Children's Television



CONCLUSION

For the foregoing reasons, ValueVision requests that the petitions for reconsideration with respect to leased access should be denied in the respects indicated above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher M. Heimann, hereby certify that on this 21st day of July, 1993, I have caused copies of the foregoing "Opposition to Petitions for Reconsideration" to be served by first class mail, postage prepaid, to the following:

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